UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 05-0338 (EGS)
ANTHONY A. WILLIAMS, *et al*.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
PLAINTIFF CSXT's MOTION FOR SUMMARY JUDGMENT

Defendants Anthony A. Williams and the District of Columbia herein (collectively, "the District"), by and through undersigned counsel, hereby submit this Memorandum of Points and Authorities in Opposition to Plaintiff CSXT's Motion for Summary Judgment, in accordance with LCvR 7(b) and (d).

As required by LCvR 56.1, defendants' Opposition to CSXT's Statement of Material Facts As to Which There is No Genuine Issue, has been provided.

The District's Motion for Summary Judgment is filed contemporaneously herewith, and is incorporated by reference herein.

I. Introduction and Summary of Argument

The District legislation is not preempted by federal law. Congress gave the States broad authority to regulate railroad security, explicitly amending the law after the terrorist attacks of

9/11 to authorize what the District has done. The preemptive scope of federal law is substantially narrower than CSXT's interpretation.

The sole federal regulation at issue here, "HM-232," was promulgated by the United States Department of Transportation ("DOT"), *not* the Department of Homeland Security ("DHS"), which was the agency designated to develop security regulations in the wake of the 9/11 attacks. Consequently, on its face, the plain language of the Federal Railroad Safety Act ("FRSA"), *codified as amended at* 49 U.S.C. §§ 20101 *et seq*. (2005), does not preempt the District's Terrorism Prevention Act.

Moreover, the terms of that single-page regulation do not "cover" or substantially subsume the subject matter of the District's legislation, because HM-232 does not impose any substantive standards.

Even more damning to CSXT's case, discovery has revealed that the United States is actively planning to update HM-232 to address rerouting of hazardous materials by rail, an implicit admission that that regulation does not *now* "cover the subject matter" of the District law at issue.

The compelled discovery that has been completed since the filing of plaintiff's motion reveals an utter lack of evidence that DOT (or any other federal agency) has expressly considered and rejected the rerouting of trains carrying hazardous materials as a method of preventing terrorist attacks. Consequently, the role that Congress expressly granted to the States and the District after the events of 9/11 remains in place—to protect citizens until the federal government prescribes substantive standards that "cover the subject matter."

In its motion, CSXT improperly relies on the provisional findings of the Circuit, which considered only plaintiff's motion for a preliminary injunction. CSXT unsuccessfully attempts to

prove a negative by arguing that the Circuit "identified no factual issue" that would preclude summary judgment. P.Mem. at 3. But the Circuit expressly declined to address *any* of CSXT's arguments aside from the likelihood of success on its FRSA challenge. *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 669 n.3 & 670 n.4 (2005) (*per curiam*) ("*CSX*") That decision, then, by its own terms, did not purport to resolve any factual issues.

As the District argued previously, the D.C. Circuit's provisional analysis of the preemption issue is not controlling, and otherwise conflicts with Supreme Court precedent and persuasive precedent from other circuits. That precedent indicates that where, as here, federal regulations do not impose substantive standards on railroads, local law is not preempted.

Discovery confirms that the federal government did not expressly reject (much less actively consider) rerouting hazardous materials as a means to prevent deadly terrorist attacks and, in fact, is planning to amend HM-232 to address that very issue.

II. Factual and Procedural Background

The facts of this matter have been laid out in the parties' previous filings and will not be repeated here except where relevant.

In a decision dated May 3, 2005, the United States Court of Appeals for the District of Columbia Circuit reversed this Court's denial of a preliminary injunction, and remanded with directions to enter a preliminary injunction prohibiting enforcement of the Emergency Act. *CSX*, 406 F.3d at 674.

The permanent version of the legislation in dispute here, the Terrorism Prevention in Hazardous Materials Transportation Act of 2006 ("Terrorism Prevention Act"), D.C. Law 16-80, *see* 52 D.C. Reg. 1047 (Feb. 17, 2006), was transmitted to Congress for review on or about

February 6, 2006. 152 CONG. REC. H221-06; S862-02 (Feb. 8, 2006). Congress raised no objection to the Terrorism Prevention Act during its mandated 30-day period of review, and the law became effective on April 4, 2006. *See* 53 D.C. Reg. 3339 (Apr. 28, 2006).

Previously in this litigation, CSXT challenged the temporary and emergency versions of the Terrorism Prevention Act.

After several months of contentious haggling over the scope of discovery, plaintiffs finally responded to the defendants' requests, producing documents and answering interrogatories and requests for admission. On August 11, 2006, the United States served its Response to Defendant-Intervenor Sierra Club's First Set of Requests for Admission and Supplemental Interrogatory (copy attached as DCEx. 2). On September 8, 2006, the United States served its Supplemental Response and a Supplemental Production of Documents.

On or about March 30, 2006, the United States, through DHS and DOT, issued a draft document entitled "Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard [TIH] Materials" to "the industry" for comment. *See* DCEx. 4 at GOV03001, GOV02994–02998. The second sentence of that document stated "All measures are voluntary." *id*. at GOV02994. The 30 recommended "Action Items" included:

> 24. Expedite the movement of trains transporting rail cars containing TIH materials. Minimize the delays in the movement of these cars at shipper and receiver facilities, in transit, and at interchanges between carriers. If practicable, *provide routing of these trains to minimize stops near critical assets within high threat and/or high risk areas*.
>
> * * *
>
> 30. *Routes should be evaluated* (considering factors such as total population exposure, distance traveled, threats, condition of track, and emergency response capabilities) to identify ways to reduce system safety and *security risks*.

Id., GOV 02997–98 (emphasis added).

By letter dated May 5, 2006, two industry groups presented their comments on the Action Items to the Federal Railroad Administration ("FRA") and the Transportation Security Administration ("TSA") (excerpt attached as DCEx. 5, at GOV02978). They stated: "[We] understand that in addition to these draft security action items, also under consideration are . . . a notice of proposed rulemaking concerning routing and storage of TIH materials . . . ." *Id*., and GOV02992 ("[We] understand that a detailed rulemaking proceeding addressing routing is forthcoming.").

"On May 10, 2006, DHS and DOT met with representatives of the freight rail industry to discuss their input and refine the Security Action Items to enhance their effectiveness." DCEx. 4 at GOV03006.

By letter dated May 31, 2006, the FRA notified industry representatives and federal officials of an upcoming conference "to discuss ways to minimize security and safety risks flowing from the transportation by rail of toxic inhalation hazard materials." DCEx. 6 at GOV02895.[1] That letter also noted that "[r]erouting arrangements and market and product swaps are subjects identified for consideration in this process." *Id*. at GOV02899.

A revised list of Action Items was issued on May 22, 2006, and continued to note that "[a]doption of these measures is voluntary." DCEx. 6 at GOV03003. This revised document

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[1] Pursuant to 49 U.S.C. § 333, the Secretary of DOT, "[w]hen requested by a rail carrier, [may] hold conferences on and mediate disputes resulting from a proposed unification or coordination project." 49 U.S.C. § 333(d)(1).

The referenced conference was requested by two industry groups on or about November 10, 2005. DCEx. 6 at GOV02895. The Secretary granted the requested conference to "assist private sector stakeholders in discussing ways to mitigate the security and safety risks inherent in TIH transport with the benefit of antitrust immunity . . . ." DCEx. 7 at GOV01191. Although the law authorizes the Secretary to invite, in addition to industry representatives and federal officials, "[s]tate and local government officials . . . and consumer representatives," 49 U.S.C. § 333(d)(1)(D), he did not do so here. *See* DCEx. 6 at GOV02896–98.

included: "23. Consider alternative routes when they are economically practicable and result in reduced overall safety and security risks." *Id*. at GOV03005.

The May 22, 2006, document also included a "Discussion Document" from the May 10 meeting. That document identified "Key Issues" including "Routing Criteria," specifically: "Current *industry routing plans* take into account safety, but *not necessarily security*, for hazmats. [G]overnment tools *under development* will integrate safety *and security methods for hazmat routes*. *[P]ending* Rulemakings (232) and conferences (333) *deal with hazmat routing security*. *Id*. at GOV03011, 03014 (emphasis added).[2]

DOT is planning to issue a Notice of Proposed Rulemaking ("NPRM"), for a "Rail routing rule," on December 26, 2006, which rule "may require rail carriers" to, *inter alia*, "assess alternative routing options and make routing decisions based on those assessments . . . ." *Report on DOT Significant Rulemakings* (*available at* http://regs.dot.gov/rulemakings/200609/phmsa.htm?type=#82).

III. Argument

A. *CSXT is Not Entitled to Summary Judgment*.

CSXT is not entitled to summary judgment on any of its claims. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[2] The parenthetical numbers apparently reference the ongoing HM-232 rulemaking, and 49 U.S.C. § 333.

In considering CSXT's motion, all evidence and the inferences to be drawn from it must be considered in the light most favorable to the District. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579 (D.C. Cir. 1998). Moreover, "the evidence offered by [the District] must be accepted as correct, and all justifiable inferences must be drawn in [its] favor." *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) (*citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)).

Summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Where more than one plausible inference can be drawn from the undisputed facts, summary judgment is not appropriate. *See United States v. Spicer*, 57 F.3d 1152, 1160 (D.C. Cir. 1995).

CSXT maintains that the instant matter poses purely legal issues, P.Mem. at 2, and hence presented no factual evidence in support of its motion, and expressly declined to supplement it after the close of discovery.

All the evidence and inferences drawn from it here demonstrate that CSXT is not entitled to summary judgment.

B. *The Terrorism Prevention Act is Not Preempted by HMTA*.

Although the D.C. Circuit focused principally on the preemption provision of the FRSA, 49 U.S.C. § 20106, any preemption analysis should *begin with* HMTA.

Enacted in 1975, the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101–5127, establishes a scheme for the safe transportation of hazardous materials. The HMTA is the statute that the DOT itself cited as authority for its promulgation of HM-232; and it was the HMTA's preemption provision that DOT summarized in analyzing the preemptive effect of HM-

232. *See* "Security Requirements for Offerors and Transporters of Hazardous Materials," 68 Fed. Reg. 14,510 *et seq*. (March 25, 2003) ("HM-232").

Thus, as DOT wrote when it issued HM-232 in its final form,

> The HMR are promulgated under the mandate of § 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq*., as amended by § 1711 of the Homeland Security Act of 2002, Pub. L. 107-296) that the Secretary of Transportation "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce."

68 Fed. Reg. 14,511. And DOT specifically explained that the preemptive effect of HM-232 should be analyzed *under the HMTA*. *Id*. at 14,519.

The HMTA provides in pertinent part: "Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State . . . is preempted if – (1) complying with a requirement of the State . . . and a requirement of . . . a regulation prescribed under this chapter . . . is not possible; or (2) the requirement of the State . . , as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, [or] a regulation prescribed under this chapter . . .." 49 U.S.C. § 5125(a). For the reasons that follow, the Terrorism Prevention Act is not preempted.

First, it is not impossible for CSXT to comply both with the District law and HM-232. Insofar as is relevant here, HM-232 merely requires CSXT to draw up and implement a security plan for transporting hazardous materials. Or, as the D.C. Circuit put it, "[u]nder HM-232, rail carriers (as well as motor carriers) are required to develop and implement security plans for transporting hazardous materials," including "'*the security risks of shipments of hazardous materials . . . en route from origin to destination*.'" *CSX*, 406 F.3d at 671 (*quoting* 49 C.F.R. § 172.802) (emphasis supplied by the court). CSX's plan can have, as one element, the District's law.

Second, the District's law is not an "obstacle" to accomplishing and carrying out HM-232 which, after all, have the same general purpose, regardless of the *means* so chosen—to *reduce* security risks arising from the transport of hazardous materials. Thus, in adopting HM-232, DOT itself acknowledged "[t]hat hazardous materials in transportation are a possible target of terrorism or sabotage is undeniable . . . ." 68 Fed. Reg. 14,518. And DOT also acknowledged, "*[g]iven a decision to attack the system, one must assume that choices will be made to maximize consequences and damage*." 68 Fed. Reg. 14,518 (emphasis added). The Nation's Capital was, of course, a target on 9/11, as were important symbols of this country's military might and financial importance. The evidence is, moreover, that these symbols of our political system remain a target.

Further, the fact that DOT ultimately (implicitly) declined to regulate routing does *not* render the District's law an obstacle, especially in light of DOT's recognition that terrorists have preferred targets, targets that would certainly include sites within the Capitol Exclusion Zone. Instead, DOT's decision was based on a combination of its inability to craft substantive regulations in a timely fashion and deference to the "DHS," the agency *specifically designated* to develop security regulations in the wake of the 9/11 attacks. *See* 49 U.S.C. § 20106.

> Consensus standards generally are specification standards; that is, they set forth *specific requirements for achieving a regulatory goal* . . . . A consensus-standards process is a lengthy process. It can take many months or even years for the parties developing such a standard to reach consensus on the appropriate measures to be implemented. The security threat is real and ongoing. *We do not have the time to spend* on development of a consensus standard for hazardous materials transportation security.

68 Fed Reg. 14,511 (emphasis added).

Instead, DOT adopted "performance standards," which "generally permit a regulated entity to determine the specific measures necessary to achieve compliance with the established

performance goal." *Id*. This rationale in no way suggests that the District's targeted law is any sort of "obstacle" to reducing security threats. In fact, the United States' announced plans to amend HM-232 to deal with "rail routing" are further indication that that regulation does *not* currently cover that topic, hence the Terrorism Prevention Act, which does, cannot be an obstacle to the federal scheme.

Indeed, as shown elsewhere, in any area in which there is no substantive federal regulation, railroads and motor carriers are free to select safety and security measures unless a State or the District steps into the void. *See* DC's Motion for Summary Judgment at 15–23.

The HMTA's preemption provision, 49 U.S.C. § 5125, makes clear—and the D.C. Circuit has held—that Congress did not intend for the DOT to exclusively occupy the field, but rather to preserve a role for states, localities, and tribes in the regulation of hazardous materials transportation. Thus, in *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891–92 (D.C. Cir. 1996), the court recognized that "[a]lthough HMTA . . . established some uniform standards in the interstate transportation of hazardous materials, the Act does not, by its terms, exclude all state participation in the regulation of hazardous waste being carried within that state's borders." *See also id*. at 896–97 (citations omitted):

> Although DOT alleges that it must preempt Massachusetts's rule because HMTA, in its preamble, seeks a "greater uniformity" . . . the limited goal of "greater uniformity" is a far cry from DOT's implicit claim that HMTA demands absolute uniformity . . . . Such a claim lacks credibility in light of numerous indications to the contrary in the statute itself.

In the emergency appeal here, the Circuit never mentioned *Massachusetts* in its decision. In that provisional decision, the Circuit observed that the "final HM-232 does not refer to routing restrictions . . . ." *CSX*, 406 F.3d at 671, comparing 67 Fed. Reg. at 22,035 (proposed regulation) and 49 C.F.R. 172.802(a)(3). "Instead," as it correctly observed, "DOT decided that security will

best be achieved by adopting performance standards and giving railroads the flexibility to adjust their security plans to their individual circumstances." *Id*.

However, as shown, DOT's decision to adopt the approach it did was the result of deference to DHS and DOT's inability to act both substantively and quickly. The record here unequivocally demonstrates that DOT never considered adopting mandatory routing standards. *See* DC's Motion for Summary Judgment, at 9–11. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 501 (1996) (federal regulations will not preempt state law if the federal agency has not "weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate . . . .").

In any event, what is critical is whether CSXT has established that the District's law is an obstacle to achieving the security goals of the Homeland Security Act's amendment of HMTA. It has not. Nor has it established that the Terrorism Prevention Act is an obstacle to the means DOT selected for achieving these goals. DOT's decision not to undertake the time-consuming task of adopting substantive criteria in light of DHS's purported future consideration of such criteria and the imminence of serious railroad security threats does not render the District's targeted law an obstacle to CSXT's overall flexibility to respond to the security risks it generates.[3]

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[3] While the District does not challenge the adequacy of HM-232 here, an argument can clearly be made that that regulation is arbitrary and capricious. "The agency has adopted a rule with little apparent connection to the inadequacies it purports to address." *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1144–45 (D.C. Cir. 2005) (regulation will be found arbitrary and capricious where agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . .") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). *See also id*. at 1147 ("[The agency's] main strategy in defending the final rule is to suggest that it is the first installment of an incremental program that will fulfill its statutory obligations. This is entirely unconvincing.").

Railroad flexibility is not an end in itself under HMTA, but one means to achieving the goals of railroad safety and security. Another means to achieving those goals—and one expressly authorized by Congress—is the exercise of State and local powers. The exercise of such powers must be upheld under HMTA unless a railroad can prove that it cannot comply with both federal and non-federal laws, or that a non-federal requirement is an obstacle to meeting federal railroad safety and security goals. CSXT has failed to discharge this burden.

Summary judgment on its HMTA claims cannot be granted to CSXT.

C. *The Terrorism Prevention Act is Not Preempted by the FRSA.*

Where federal and non-federal laws overlap, the proper judicial approach is to reconcile the statutory schemes rather than hold one completely ineffectual. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (Supreme Court "generally reluctant to infer preemption" and it would be "particularly inappropriate to do so in this case because the basic purposes of the state statute and the [federal act] are similar."). Here, however, CSXT's interpretation of federal law would render the District law completely ineffectual.

While the District agrees with the statutory and regulatory framework set out in the Circuit's opinion here, the panel has provisionally drawn the wrong conclusions from this framework. Its approach contradicts the express language of the FRSA and controlling and persuasive case law.

When Congress authorized federal regulation of railroad safety in 1970 and then, in response to the 9/11 attacks, amended the law in 2002 to encompass railroad security, it made applicable two explicit savings clauses that authorize States to prescribe railroad security measures. *See* H.Rep. 91-1194, at __, *reprinted in* 1970 U.S.C.C.A.N. 4105 ("[T]here is a strong

consensus which makes it appear clearly that the time is now here for broadscale Federal legislation with provisions for active State participation to assure a much higher degree of railroad safety in the years ahead."). *See also* Homeland Security Act of 2002, Pub. L. 107-296, §§ 1710–11 (116 Stat. 2135 (Nov. 25, 2002)).

The FRSA mandates that regulation of railroad safety and security be "nationally uniform to the extent practicable" and, in its first savings clause, states that it does not preempt State regulation unless the United States issues regulations "covering the subject matter." 49 U.S.C. § 20106. *See also CSX*, 406 F.3d at 670.

In the FRSA's second savings clause, Congress expressly authorized States to

> . . . adopt or continue in force *an additional or more stringent law*, regulation, or order related to *railroad* safety or *security* when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. at § 20106 (emphasis added). *See also CSX*, 406 F.3d at 671.

HM-232 Does Not "Cover the Subject Matter" of the Terrorism Prevention Act.

CSXT contends that HM-232 "covers the subject matter" of the Terrorism Prevention Act. P.Mem. at 4. The Supreme Court has ruled that the FRSA's first savings clause—the "covering" preemption provision—must be narrowly construed, and does not extend to federal regulations that merely address the same general subject matter. The federal regulation must "substantially subsume" the subject matter. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 352 (2000).

For the reasons stated in the District's Motion for Summary Judgment, HM-232 does not "cover the subject matter" of the Terrorism Prevention Act.

Under both *Easterwood* and *Shanklin*, the FRSA does *not* preempt the District's law; HM-232 imposes *no* substantive standards at all, delegating all security assessments and decisions to the railroads themselves in the first instance. That single-page "general mandate" does not cover the subject matter of routing restrictions, and hence does not preempt the Terrorism Prevention Act.

The Terrorism Prevention Act Qualifies for the "Safe Harbor" Provisions of the FRSA.

CSXT argues that the Terrorism Prevention Act is not saved from preemption under the FRSA's second savings clause, the so-called "safe harbor" provisions, because it does not address "an essentially local safety or security hazard," is incompatible with HM-232, and unreasonably burdens interstate commerce. P.Mem. at 5–6 (*citing* 49 U.S.C. § 20106 and *CSX*, 406 F.3d at 672–73).

CSXT argues first that "the vulnerability of hazardous materials passing near the Capitol *can be* addressed by uniform national standards . . . ." P. Mem. at 5 (emphasis added). But that statement assumes the truth of the underlying syllogism; *of course* rail transportation of hazardous materials "can be" addressed by uniform national standards. But the District's point here is that HM-232 does *not* establish a uniform national standard, but instead delegates responsibility to the railroads in the first instance to develop security plans with substantive requirements.

It is one thing to attribute to Congress an intention to preempt State railroad security laws when DOT adopts a nationally uniform standard governing a particular matter. It is quite another to infer that Congress intended to preempt State security measures when DOT decides *not* to adopt nationally uniform standards. The fact that DOT concluded that nationally uniform

standards were inadvisable, at least for now, should not be interpreted as preempting *all* State laws addressing local railroad security. *See Union Pac.*, 346 F.3d at 868 ("Because the FRA merely *deferred* making a rule, rather than determining that *no regulation was necessary*, the state can legitimately seek to fill this gap.") (emphasis added) (*citing Tyrrell*, 248 F.3d at 525); *New Hampshire Motor Transport Assn. v. Plaistow*, 67 F.3d 326, 333 (1st Cir. 1995) ("there is no regulation by federal authorities that provides substitute protection."), *cert. denied,* 517 U.S. 1120 (1996).

Here, the record underlying HM-232 shows that DOT clearly *deferred* making a substantive rule because it did not have the time to develop "specific requirements," 68 Fed Reg. 14,511, and never determined that no regulation of routing was necessary. Consequently, the District "can legitimately seek to fill this gap." *Union Pac.*, 364 F.3d at 868.

As the Supreme Court explained in a similar context in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002):

> It is quite wrong to view th[e] decision [not to adopt a regulation] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. [I]ndeed, history teaches us that a Coast Guard *decision not to regulate a particular aspect* of boating safety is fully consistent with an *intent to preserve state regulatory authority pending the adoption of specific federal standards*. [T]hus, although the Coast Guard's decision not to require [specific devices for boats] was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of federal policy against [the devices].

Id. at 65–67 (emphasis added). *See also Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (suggesting that "negative exercises of federal authority" have little preemptive effect).

Here, DOT's decision not to impose any substantive standards is fully consistent with the FRSA's intent to preserve state regulatory authority pending the adoption of specific federal standards.

In other words, the FRSA's generic concern for uniformity does "not justify the displacement of [local regulations] that serve the Act's more prominent objective, emphasized by its title, of promoting [railroad] safety." *Sprietsma*, 537 U.S. at 70. Logically, "national uniformity" cannot be advanced by allowing dozens of individual railroads to act separately, each according to their own standards.

Interpreting HM-232's railroad "flexibility" as the equivalent of a nationally uniform, substantive standard is legally incorrect, pursuant to *Easterwood* and *Shanklin*. Moreover, because there are no substantive standards imposed by HM-232, that interpretation would equate "flexibility" with no regulation at all, *i.e.*, complete preemption of *any* non-federal action affecting railroad security. But that interpretation would impermissibly render the FRSA's two explicit savings clauses a nullity. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (basic rule of statutory construction is to avoid interpretations that render some provisions superfluous).

In addition, CSXT claims that "[t]he need to protect the United States Capitol and its environs from terrorist attack is and could hardly be a more quintessentially national concern." P.Mem. at 5–6 (*quoting CSX*, 406 F.3d at 672 (*quoting* the United States' Memorandum)).

CSXT presents a false dichotomy; while the need to protect the District may also be a "national concern," that statement is analytically distinct from the scrutiny required to determine under the FRSA whether there exists "an essentially local safety or security hazard."

That term's ambiguity itself recommends against finding preemption here. *See Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236, 1241 (D.C. Cir. 1999) (presumption against

pre-emption counsels *against* finding it when purpose of Congress is not clear from statute's language), *aff'd*, 529 U.S. 861 (2000).

Some circuits have determined that that term means a hazard which is "not capable of being adequately encompassed within national uniform standards." *Union Pac.*, 346 F.3d at 860 (*citing Nat'l Ass'n of Regulatory Util. Commissioners v. Coleman*, 542 F.2d 11, 14–15 (3rd Cir. 1976); *Norfolk & W. Ry. v. Pub. Util. Comm'n*, 926 F.2d 567, 571 (6th Cir. 1991)).

But while that statement may be a good first step, it is not enough given the statutory language, particularly where, as here, there is no "national uniform standard." In such a situation, *any* hazard is "*capable* of being adequately encompassed" if one imagines a suitably broad federal regulatory scheme. If the "national uniform standard" required the rerouting of ultra-hazardous materials around all large cities, the District would be covered; if the imaginary federal regulations protected only the highest-threat terrorist targets, the District would be covered. Unfortunately, however, no such "national uniform standard" exists. Simply because a hazard is "capable of being adequately addressed" on a national basis does not render impermissible the District's exercise of its police powers to address a local concern.

While a terrorist attack on a rail car carrying hazardous materials through the District would raise national concerns, the damage and primary impact of such an attack would be uniquely local.[4] The District, because it is the nation's capital, presents a unique specific,

[4] Some federal courts, citing *Easterwood*, have suggested that "an essentially local hazard" means a "specific, individual hazard" not a condition that can be or is present at many or most sites within the State. *See, e.g., Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 640 (5th Cir. 2005) (*citing, inter alia, Easterwood*, 507 U.S. at 675 n.15); *Stone v. CSX Transp., Inc.*, 37 F.Supp.2d 789, 795–96 (S.D. W. Va. 1999) (hazard is one, *inter alia*, that "cannot be statewide in character"). *Cf. Anderson v. Wisconsin Central Transp. Co.*, 327 F.Supp.2d 969, 978 (E.D. Wis. 2004) ("a specific, individual hazard is a person, vehicle, obstruction, object or event which is not a fixed condition or feature") (citations omitted). *(footnote continues)*

individual hazard that is not replicated anywhere else in the country. It is not akin to any other large city, or even to any other high-risk target. Nowhere else can a railcar carrying ultra-hazardous materials pass within blocks of the Capitol.[5] Although the District's unique situation theoretically *could be* addressed by uniform national standards requiring re-routing around designated high-risk corridors (or re-routing around all large cities), the imposition of such broad national standards has not occurred. As noted, however, HM-232 defers to the individual railroads to assess and address security risks, and the FRSA expressly authorizes State involvement in that process. These two factors, together with the United States' planned further action on "rail routing," amount to an acknowledgment that, at the present time, national standards cannot adequately address the kind of security risks that may present themselves at various points on a given rail route, much less the unique threat to the District.

Moreover, the Terrorism Prevention Act is not "incompatible" with HM-232. The Supreme Court holds that such incompatibility or conflict must be supported by "identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Geier*, 529 U.S. at 884 (citations omitted). CSXT has never identified any such actual conflict.

Under this standard, the risk of terrorist attack on sites within the Capitol Exclusion Zone—such as the Capitol and the White House—clearly qualifies as "an essentially local safety or security hazard" because it is limited to a potential situation involving a handful of specific, high-profile, previously targeted sites.

[5] *See* "Washington's Deadly Bridge," N.Y. TIMES, July 5, 2004, at A16:

> The weakest point in America's defense against terrorism may be an inconspicuous little bridge a few blocks from the Capitol. [B]ecause of its location in the middle of official Washington, a chlorine leak from a rail tanker on the bridge at [Second St. & E St., S.W.] could endanger much of the federal government, including Congress and the Supreme Court.

If CSXT's interpretation is to be believed, because HM-232 essentially gives free reign to railroads in the first instance, through its purported "flexibility," the FRSA would then preempt *any* attempt by *any* non-federal entity to impose *any* regulatory standards on a railroad. A simple statement by the federal government declining to impose substantive standards should not have the broad preemptive effect CSXT urges here, because it would leave the railroads fundamentally unregulated by anyone.

Summary judgment on the FRSA claims cannot be granted to CSXT.

D. *The Terrorism Prevention Act is Not* Per Se *Invalid Under the Commerce Clause.*

Rather than repeat the successful arguments that the District made previously regarding plaintiff's Commerce Clause claims, the District here merely notes that CSXT has failed to introduce any new evidence to support its claims, relying solely on the implications of the Circuit's ruling. The Circuit noted that "it appears" that the Terrorism Prevention Act "unreasonably burden[s] interstate commerce" based on the possibility of similar legislation from other jurisdictions. *CSX*, 406 F.3d at 673. The Circuit did not, however, mention or distinguish *Electrolert*, which held that "[S]tate safety regulations are accorded particular deference in Commerce Clause analysis." *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984) (*citing South Carolina State Highway Dep't v. Barnwell Bros., Inc*., 303 U.S. 177, 189 (1938) and *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978)).

As this Court properly noted, because the Terrorism Prevention Act "is nondiscriminatory and advances legitimate safety concerns," it comes before the Court in the "strongest possible posture" and CSXT has not established that it unreasonably burdens interstate commerce. April Order at 54–55 (*citing Electrolert*, 737 F.2d at 113). *Cf., e.g., Atlantic Coast Line Railroad Co. v.*

Georgia, 234 U.S. 280, 291–94 (1914) ("[I]n the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce.") (citations omitted).

E. *The Circuit's Decision Was, By Definition, Limited and Provisional.*

While CSXT correctly points out that the Circuit found that plaintiff was "substantially likely" to succeed on its claim that the Emergency Act was preempted by the FRSA, P.Mem. at 4 (*citing CSX*, 406 F.3d at 672), it fails to acknowledge the narrow nature of the Circuit's ruling.

The Circuit did not purport to resolve any factual issues, and its preliminary legal conclusions are not binding here or in a later appeal. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (The "conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits . . . .") (*citing, inter alia, Industrial Bank of Wash. v. Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968)). *See also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("any conclusions reached at the preliminary injunction stage are subject to revision . . .").[6] *Cf. Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (D.C. Cir. 2004) (preliminary injunction customarily granted on "less formal" procedures and "less complete" evidence than that in a trial on the merits) (*citing Camenisch*); *NRDC v. Pena*, 147 F.3d 1012, 1023 (D.C. Cir. 1998) ("[A] court's findings of fact and conclusions of law at the preliminary injunction stage are often based on incomplete evidence and a relatively hurried consideration of the issues. [T]he questions focused on differ in deciding a motion for

[6] *See also, e.g., Thompson v. Harris*, 551 F.2d 1316, 1317 (D.C. Cir. 1977) (while initially affirming denial of preliminary injunction based on little likelihood of success on the merits, Circuit reached a different result in subsequent appeal).

preliminary injunction and in deciding a motion for summary judgment.") (*quoting Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1205 (7th Cir. 1985) (citations omitted)); *Taylor v. FDIC*, 132 F.3d 753, 766 (D.C. Cir. 1997) (Circuit's denial of preliminary injunction "lacks authoritative weight" for subsequent appeals).[7]

The Circuit's decision was made quickly, on an emergency basis, and, by its own terms, was limited to the issue of CSXT's likelihood of success on the merits of its FRSA preemption claim. Consequently, the Circuit's decision is substantially more circumscribed than CSXT acknowledges. Indeed, the Circuit explicitly refused to address the "other relief" CSXT requested—including entry of summary judgment on its claims. *Id*. at 670 n.4. Specifically, the Circuit expressly declined to address CSXT's claims under the HMTA, the ICCTA, or the Commerce Clause. *CSX*, 406 F.3d at 669 n.3.

By contrast, this Court expressly found that it could *not* resolve CSXT's summary judgment claims without further discovery. April Order at 75.

Notwithstanding the compelled discovery eventually produced here, CSXT fails to support its motion with *any* additional evidence. As the District argued in its Motion for Summary Judgment, that evidence entirely supports summary judgment for the District on all counts of the Second Supplemental Complaint. *Cf. Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 251 (D.C. Cir. 1987) (district court properly considered subsequent motion for summary judgment, where substantial discovery took place after the denial of the first

[7] *See also Pharmaceutical Research and Manufacturers of America v. Thompson*, 259 F.Supp.2d 39, 61 (D.D.C. 2003) ("[A] tentative assessment made to support the issuance of a preliminary injunction pending resolution of the issue . . . is not even law of the case, much less *res judicata* in other litigation") (*quoting Community Nutrition Inst. v Block*, 749 F.2d 50, 56 (D.C. Cir. 1984)).

motion, adding "highly material" evidence) (*citing Brownfield v. Landon*, 307 F.2d 389 (D.C. Cir. 1962)).

III. Conclusion

CSXT has failed to carry its burden on its motion for summary judgment. Its motion should be denied.

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Respectfully submitted,

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